Supreme Court, U.S.
FILED

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No.

In the

Supreme Court of the United States

GARY RAVET and PROMARK INC.,

Petitioners,

v.

ENTERTAINMENT PUBLICATIONS, INC.,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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43 pp

QUESTIONS PRESENTED

1. Do due process requirements fairly made a part of arbitration proceedings conducted under the Federal Arbitration Act mandate that an arbitration be conducted with both parties present, such that an arbitration award should be vacated when the arbitrator continued the proceedings with only one party present after the other party accepted a settlement prior to the proceedings and therefore declined to appear?

2. Do requirements of impartiality in arbitration proceedings, expressly incorporated in the Federal Arbitration Act and consistent with due process, require an arbitration award be vacated where the arbitrator unquestionably expressed bias toward one party, the award was severely affected by such bias, and where this bias, indicated in advance, prompted the party to decline to appear?

3. Do policies embodied in the Federal Arbitration Act require an arbitration award be vacated when the arbitrator exceeded his authority?

4. Should an arbitration award be vacated when the arbitrator dispensed his own brand of industrial justice?"

PARTIES TO THE PROCEEDING

Including the parties named in the caption of this Petition, the parties are:

Petitioners: Gary Ravet ("Mr. Ravet"), an individual.

Promark, Inc. ("Promark"), a nongovernmental corporate party to the proceedings before United States District Court for the Southern District of California and the United States Court of Appeals for the Ninth Circuit.

Promark, Inc. here discloses that it is a California company, that there are no parent corporations to Promark, Inc., and that there are no publicly held companies which own 10 per cent of more of Promark, Inc.'s stock.

Respondent: Entertainment Publications, Inc. ("EPI"), a Michigan corporation. Petitioner states that EPI is a wholly owned division of Cendant Corporation, a publicly-traded corporation (NYSE symbol, "CD").

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IN THE
SUPREME COURT OF THE UNITED STATES

GARY RAVET
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PROMARK INC.,
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ENTERTAINMENT PUBLICATIONS, INC.,
Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

GARY RAVET and PROMARK, INC., Petitioners, by undersigned counsel, under appropriate rules of this Court, request that this Court issue a writ of certiorari to the United States Court of Appeals for the Ninth Circuit.

OPINIONS BELOW

This is a dispute over a business acquisition arrangement, which originally was the subject of a mediation but which later was brought before the United States District Court for the Southern District of California and then to the United States Court of Appeals for the Ninth Circuit, The governing legislation is the Federal Arbitration Act ("FAA"). All decisions are unreported.

The matter began as a mediation conducted on February 9 and 10, 1999. (Hon. Layn R. Phillips, Esq. U.S. District Judge (Ret.)). That proceeding was challenged

in the District Court by Petitioners as fatally affected by fraud.

The District Court directed or permitted an additional mediation. This was conducted on April 1, 1999 (Judge Phillips). The mediator issued a decision on May 10, 1 999 entitled, "Confidential Arbitration Order- Resolving Disputes Arising Out of Settlement."

Following that decision, Petitioners sought relief in the District Court. These actions were countered by Respondent. Jurisdiction was invoked through the FAA. On July 6, 1999, the District Court (Whalen, J.), issued decisions and orders, granting Respondent's motions to compel further arbitration. Over Petitioners' objections, the matter returned to what was to be a final arbitration.

In a telephone conference of August 6, 1999, prior to the arbitration proceeding, Petitioners realized the arbitrator (Phillips) had developed a bias against Petitioners and would not conduct an acceptable proceeding. Petitioners therefore sought, on that same date, immediate *ex parte* relief in the District Court to recuse the arbitrator, This motion was not attended to immediately and ultimately was denied, by Opinion and Order of August 16, 1999. However, the motion was withdrawn in a filing by Petitioners on August 9, 1999.

Nevertheless, on August 9, 1999, with the arbitration proceeding about to go forward and without a ruling on the recusal motion, Petitioners were left with no choice but to accept a previous and unadvantageous offer by Respondent to settle the issues, shortly before proceedings were to begin. Yet Respondent contended the offer no longer was active and insisted arbitration be conducted *even*

though Petitioners had declined to appear, The arbitrator did so. He then issued a "Confidential Arbitration Order" dated August 9, 1999 as to the issues supposedly before him.

Petitioners challenged in District *Court* the arbitration order and sought to confirm the settlement to which they had agreed prior to arbitration. Respondent sought to confirm the arbitration award. On October 26, 1999, the District Court issued an Opinion and Order granting Respondent's motion to confirm the arbitration awards, denying a motion for sanctions, denying an application for a temporary restraining order, and terminating the ease. Petitioners appealed.

On April 17, 2001, the Court of Appeals for the Ninth Circuit affirmed. Granting Respondent's request, the Court determined Petitioners' appeal was frivolous and imposed sanctions under 28 U.S.C. §§1912 and 1917, and under Federal Rule of Appellate Procedure 38. On June 28, 2001, the Ninth Circuit denied a motion for reconsideration.

GROUNDS FOR JURISDICTION

Subject matter jurisdiction for the mediation and arbitration proceedings is found in the Federal Arbitration Act (FAA), 9 U.S.C. §1 et seq.

Subject matter jurisdiction for the United States District Court for the Southern District of California is found also in the FAA. Subject matter jurisdiction for the Court of Appeals for the Ninth Circuit was invoked through the FAA and 28 U.S.C. §1291.

Jurisdiction of this Court is invoked under 28 U.S.C. § *1254(1).* This Court granted a motion for extension of

time to submit this Petition, to October 26, 2001.

STATUTES OR PROVISIONS INVOLVED

Federal Arbitration Act, 9 U.S.C. § 1 et seq.
28 U.S.C. §§1912 and 1917
Federal Rule of Appellate Procedure 38

STATEMENT OF THE CASE

A. General Background and Description

Gary Ravet ("Mr. Ravet") is a California resident, attorney, and businessman, Promark, inc. ("Promark'), a company he founded and managed through an employment agreement, is a California corporation. Promark engages in promotional programs and campaigns, usually involving professional sports. Entertainment Publications, Inc. ("EPI") is a wholly-owned subsidiary of Cendant Corporation, which in turn holds or owns numerous other companies.

On June 11, 1998, EPI/Cendant purchased substantially all of the assets of Promark, creating a "Promark Division" within EPI, Under the arrangement, Mr. Ravet was to continue to operate Promark under the EN umbrella. However, Mr. Ravet soon became disenchanted with EPI's ways of doing business and became convinced that EPI's chief objective was merely to purchase Promark in order to eliminate it as a competitor and effectively to destroy it as a functioning entity. Among the bases of Mr. Ravet's conclusions were EPI's reluctance to honor crucial aspects of the purchase arrangement, including providing necessary assets and support to enable the "Promark Division" to grow.

On November 9, 1998. just a few months after the purchase arrangement, the parties held a mediation in New

York before a professional mediator, The result was a verbal agreement for Cendant/EPI to pay Ravet and Promark a settlement amount and return Promark's assets to it. That agreement was breached by EPI before it even could be documented. On December 22, 1998, EN brought an action against Mr. Ravet and Promark in United States District Court in California, alleging trademark violations, This litigation was never pursued by EPI, it clearly was intended only as leverage to force Mr. Ravet and Promark to the settlement table. (On March 8. 1999, Mr. Ravet and Promark filed a cross-complaint in that ease, alleging fraud, misrepresentation, and breach of contract. However, the cross-complaint was dismissed on May 27, 1999.)

B. Mediation/"Settlement" of February, 1999

In February 9 and 10, 1999, the parties once again attempted a mediation session. This session was conducted by Hon. Layn Phillips, U.S. District Court Judge (retired) ("Judge Phillips" or "Arbitrator"). This February, 1999 proceeding resulted in what appeared to be a final settlement in which, among other things, Mr. Ravet and Promark would be paid a sum of-nearly $300,000.

The settlement consisted of eight "deal points:"

1) Mr. Ravet could use the Promark name;

2) Mr. Ravet *would be assigned existing contracts with certain national league baseball teams for promotional coupon book campaigns, namely the Seattle Mariners. Oakland Athletics, and Arizona Diamondbacks;*

3) EPI would not enforce a non-competition provision;

4) EPI would send a letter correcting an earlier extremely negative letter sent to Promark contacts, the "second letter" confirming that EPI and Promark had settled their differences and Promark was in business on its own;

5) a cash payment would be made to Promark executive or manager Rich Israel in exchange for a release;

6) the parties would mutually release each other from liability and dismiss with prejudice all litigation between them;

7) Promark would return any EPI property or proprietary material, and

8) *the parties would submit any disputes arising from this settlement to Judge Phillips for binding, non-appealable arbitration,*

C. Fraud Discovered as to Settlement, Action

The result of this February, 1999 mediation might have concluded matters between the parties, were it not for the fact that EPI failed to disclose that one of the coupon book promotional contracts expressly made part of one of the eight "deal points"--namely, the contract with the Seattle Mariners--had been canceled. The existence of these team contracts and Promark's ability to proceed with them were crucial to Promark's viability following the settlement. They always were essential aspects of the agreement.

Very soon after the mediation conference and its eight-point agreement, Mr. Ravet learned that the Mariners contract had been canceled by EN or that EN had been aware that the contract was no longer viable, This fact not only confirmed for Mr. Ravet EPI's lack of good faith in conducting the settlement, but it also punched a gaping hole in the settlement agreement itself

Mr. Ravet and Promark thereupon sought relief in the District Court, seeking to set aside the settlement due to EPI's fraud. Mr. Ravet and Promark advanced several arguments supporting their contention that fraud occurred, that the settlement was fatally affected by it, and that the

settlement should be set aside. This included the effect of Federal Rule of Civil Procedure 60(b).

This action resulted in further pleadings in District Court in which the parties vigorously disputed whether Mr. Ravet for Promark knew at the time of the settlement that the Mariners contract was canceled or was not viable, and the significance of that contract to the settlement, Mr. Ravet contended strongly throughout all proceedings that lie had no way of knowing, at the times that the Mariners contract was canceled and that the significance of this fact to the settlement--as well as being an indication of EPI's settlement conduct--was obvious. Indeed, Mr. Ravet's personal and legal reactions upon learning of the canceled Mariners contract themselves are conclusive in any determination of whether he knew of the contract's cancellation prior to settlement and how pivotal it was to the settlement. He said in a later mediation session of April 1, 1999 that there was still "a hole in the roof' where his bead had hit when he learned of the canceled Mariners contract. He stated had he known EPI had canceled that contract, he would not have agreed to the settlement at all.

D. Further Mediation. "Confidential Arbitration Order" of May, 1999, District Court Rejects Petitioners' Challenge to Settlement and Arbitration, Compels Further Arbitration on Remaining Issues

Reviewing Petitioners' challenge to the settlement, the District Court (Whalen, J.) (at a status conference of March 22, 1999) confirmed that the parties could proceed to further mediation to narrow the issues prior to an upcoming May 24, 1999 hearing on Mr. Ravet's and Promark's motion to set aside the settlement due to fraud. The parties

therefore returned to Judge Phillips as a mediator, He conducted a five-hour session on April 1, 1999. However, the session was difficult and was marred by indications that the mediator had little interest in Mr. Ravet's and Promark's contentions.

Following this session, Judge Phillips issued a May 10, 1999 Memorandum and Order entitled, "Confidential Arbitration Order Resolving Disputes Arising Out of Settlement." Judge Phillips could not resist commenting on the ease, beginning his Memorandum and Order with the remark, 'Civil eases don't come nastier than this one." The remark5 to say the least, was out of order.

On the merits, the Arbitrator determined in this Memorandum that Mr. Ravet's and Promark's fraud allegations were not specific and were inconsistent, that Mr. Ravet himself had sufficient information prior to the February, 1999 settlement to be aware that the Mariners contract was canceled and thus this fact was not deliberately concealed by EN, that the value of the Mariners contract to the settlement was minimal, and that EPT is not responsible for expenses borne by Mr. Ravet and Promark except for a minimal award of $2,506.13.

Following the "Confidential Arbitration Order," Mr. Ravet and Promark continued to challenge the settlement and EPI's actions, However, in an effort to operate in good faith, Mr. Ravet and Promark tendered on May 11, 1999 an executed settlement agreement reflecting settlement language so far agreed upon. Those efforts were rebuffed by EPI. Thus, taking its own turn with "leverage" litigation, on May 21, 1999, Mr. Ravet and Promark flied an extensive and action in California Superior Court for damages based on EPI's canceling the Mariners contract. This action was

removed to District Court and assigned to Judge Whalen, Respondent, in turn, continued to seek an Order in District Court confirming the "settlement" of February, 1999 and compelling arbitration as to remaining issues. Such motions were filed in the present matter as well as in the matter removed to District Court.

On July 6, 1999, the District Court (Whalen, J.), issued two contemporaneous decisions and orders (one for the present matter and one in the case removed to District Court). These orders granted Respondent's motions to compel arbitration and to stay further action. The District Court rejected Mr. Ravet's and Promark's contentions that there never was a confirmed settlement because there was no final agreement and because fraud affected the settlement, and likewise that there was no agreement to bring all issues solely to arbitration. The Court found that fraud did not affect the agreement to arbitrate. Further, as to the fraud allegations, "since [Ravet's and Promark's] allegation of fraud does not relate specifically to the arbitration provision, the issue of fraud is not for this court to decide." [Emphasis retained, footnote omitted]. Thus, since according to the District Court, the parties "made a valid agreement to arbitrate disputes arising out of the settlement agreement and the instant dispute is within the scope of the arbitration agreement, the court grants [EPI's] motion to compel arbitration." [See Order at pp. 9-10].

Through these District Court filings, the matter therefore returned to what was to be a final arbitration as to remaining issues from the eight-point settlement of February, 1999. The fraud issue upon which Mr. Ravet and Promark sought to cancel the settlement, preclude arbitration, and bring the matter to District Court, was foreclosed. Arbitration was directed to four remaining

issues:

1) whether Mr., Ravet and Promark are entitled to interest on the settlement sum (nearly $300,000);

2) what is the "closing date" for the settlement;

3) whether the settlement bars other claims raised by Mr. Ravet and Promark, such as in the present matter and in the action removed to District Court, and

4) whether EPI is entitled to certain expenses.

In this context, Mr. Ravet and Promark as well as EPI submitted "Arbitration Briefs." Mr. Ravet and Promark filed an extensive brief; reviewing the background, describing legal authorities, and discussing the four issues at length. Mr. Ravet and Promark sought an order that:

1) immediate payment of the settlement sum of $287,000 plus interest at $78.63 per day from February 19, 1999 to date,

2) general releases extend only to February 10, 1999,

3) the settlement does not bar any other actions or claims except specific claims identified by Mr. Ravet and Promark in their arbitration brief,

4) Mr. Ravet and Promark are not liable to EN for any further expenses.

E. Bias Evident in Further Arbitration, Petitioners Seek Recusal of Arbitrator, Recusal Not Effectuated, Petitioners Accept Prior Settlement, Do Not Appear At Arbitration, But Arbitration Nevertheless Proceeds

The arbitration proceeding to confirm the eight-point February, 1999 settlement (Mr. Ravet and Promark continued to dispute that such a settlement was valid or was

in force) and to resolve the four identified issues was to be conducted on August 9, 1999 in California (Judge Phillips), However, in a telephone conference of August 6, 1999, as to procedural matters concerning the arbitration proceedings, the Arbitrator exhibited further and even more extreme bias and prejudice toward Mr. Ravet and Promark. For example, the Arbitrator refused to answer standard questions by Mr. Ravet about the proceeding. The Arbitrator simply told Mr. Ravet to "make your record" and indicated that the questions or concerns would have no bearing on the Proceeding. The discussion came to the point of Mr., Ravet asking the Arbitrator to recuse himself The Arbitrator refused to do so.

It became crystal dear to Mr. Ravet (for himself and for Promark) that in the arbitration proceeding about to take place, Mr. Ravet and Promark would not be permitted to introduce pertinent evidence or to present witnesses if necessary, and that, more seriously, the Arbitrator had pre judged the matter, Thus, any relief sought by Mr. Ravet and Promark would be refused.

To achieve some equity in the arbitration, Mr. Ravet and Promark sought immediate ex parte relief in the District Court, on August 6, 1999 (which was a Friday), for recusal or removal of the Arbitrator, Declarations of Mr. Ravet and counsel for Promark were attached to this motion. Mr. Ravet and Promark were informed by the Clerk and by court staff that Judge Whalen was not available and that in any ease, the motion could not be ruled upon by the time of the arbitration proceeding on August 9. (The motion eventually was denied by Opinion and Order of August 16, 1999. However, it was withdrawn in a filing by Petitioners on August 9, 1999.)

Given that recusal of the Arbitrator could not be effectuated and the arbitration proceeding would not conform to any reasonable sense of due process for Mr. Ravet and for Promark, Mr. Ravet and Promark, shortly before the proceeding began, accepted a previous settlement proposal submitted by EPI (dated May 13, 1999, as part of settlement correspondence of May, 1999). This was not a wholly advantageous settlement for Mr. Ravet and Promark. Yet Mr. Ravet and Promark believed it would be better than results likely to come from a biased arbitration proceeding.

However, acceptance by Mr. Ravet and Promark of a settlement offer by EPI, even though it occurred shortly before the proceeding, **did not prevent the arbitration proceeding.** Instead, the Arbitrator ***conducted the August 9, 1999 proceeding in the absence of Mr. Ravet and (counsel for) Promark.*** The Arbitrator faxed a letter on the morning of the proceeding, to Mr. Ravet and to counsel for Promark, stating the Arbitrator was aware that Mr. Ravet and Promark had accepted a settlement, but that the arbitration would continue as scheduled.

In that faxed letter, the Arbitrator also added several issues to be decided at that time, along with the four issues which (supposedly) were before him, including: whether Mr. Ravet's "contempt for the Arbitrator's rulings' warranted withholding the settlement sum until "all claims for which Ravet is liable are resolved;" whether Mr. Ravet's settlement figure "should be reduced by the amount of damages he caused by breaching the Settlement Agreement," and whether Mr. Ravet and Promark should be precluded from all further litigation of any kind against EPI, Cendant or their employees as to these matters "without first showing the Arbitrator good cause for proceeding"

The Arbitrator went forward with the arbitration proceeding, solely with counsel for EPI. The proceeding was transcribed and made part of the record in Mr. Ravet's and Promark's later attempt at relief before the District Court and their appeal to the Ninth Circuit, in that transcript, the Arbitrator made several comments demonstrating his bias against Mr. Ravet and Promark, such as the "furious effort" by Mr. Ravet and Promark to challenge the settlement and prior arbitration [T, 11], Mr. Ravet's "flouting of the orders of the arbitrator" [T. 1 9], Mr. Ravet's "totally unnecessary, vexatious, and frivolous lawsuit" against EPI" [T. 23], and the Arbitrator's desire to impose substantial sanctions against Mr. Ravet and Promark under Federal Rule of Civil Procedure 11 and 28 U.S.C. §1927. The Arbitrator determined that authority for any sanctions was with the District Court. He urged EPI counsel to seek sanctions in the District Court and perhaps also to notify the California Bar Association. [T. *25-T.* 28].

F. Arbitration Order and Award, Challenge

At the conclusion of the arbitration "proceeding," the Arbitrator read an Order into the record. This was filed as a "Confidential Arbitration Order" dated August 9, 1999.

In that Order, Mr. Ravet's and Promark's worst fears were realized. It provided, among other things, that the "closing date" would be seven days from the date of the Order, the settlement figure would be reduced unless Mr. Ravet and Prom ark could show proof of payments to certain third parties, mutual releases would extend to the closing date, Mr. Ravet and Promark were not entitled to interest on the settlement figure, and all present actions are barred by the settlement including the State court action filed by Mr. Ravet and Promark and removed to District Court.

Also, the Arbitrator ordered that Mr. Ravet and Promark be barred from further litigation in this matter unless approved by the Arbitrator, due to Mr. Ravet's "vexatious multiplication" of proceedings, his "refusal to abide by the settlement he entered into," and his "infliction of unnecessary and additional expense and loss of time on all parties, including the public through his misuse of the judicial process." This Order and the Arbitrator's comments had little basis in reality and totally ignored EPI's own bad faith and vexatious conduct.

Mr. Ravet and Promark declined to recognize the validity of this Order, They proceeded in District Court to confirm their acceptance of the EPT settlement (which occurred just prior to the arbitration proceeding), and to challenge the Arbitrator's Order and Award as affected by bias and misconduct. To this effect, Petitioners submitted declarations and an extensive memorandum with discussion of authorities. Respondent EPI, for its part, filed a motion to confirm the arbitration Order and Award, for sanctions, and for other relief

On October 26, 1999, the District Court (Whalen, 1), granted EPI's motion, thus confirming arbitration order and awards. The Court denied the request for sanctions and for other relief and terminated the case. The Court stated that under its approach to standards regarding judicial review of arbitration orders or awards, there is no basis to overturn August 9, 1999 Order. The Court concluded that the absence of Mr. Ravet and Promark from the arbitration proceedings did not affect their validity. It said, "The arbitration agreement itself was self-executing and did not vest Ravet or Promark with the authority to unilaterally withdraw from noticed arbitration proceedings." The Court further found that the May 13, 1999 EPI settlement proposal

could not have been "accepted" by Mr. Ravet and Promark prior to the arbitration proceedings because Mr. Ravet supposedly had rejected that proposal previously, the proposal had expired, or Mr. Ravet's subsequent action in California court against EPI nullified any pending settlement proposal with EPI.

The District Court concluded that the agreement between the parties allowed for binding arbitration and authorized the parties to proceed to arbitration. A district court "must uphold the findings of the arbitrator so long as they are plausible." The Court said the orders "were all issued pursuant to the parties' agreement to arbitrate." It reviewed the Arbitrator's Orders and said they are "well-reasoned, properly founded on the facts of this ease, and without manifest disregard for the law." [Footnote omitted]. The Court stated the litigation "must end" and therefore EPI "is entitled to the benefits of the settlement it bargained for over six months ago." (As to the Court's decision not to award sanctions, see fn. 4).

G. Ninth Circuit Affirms

On December 1, 1999, Petitioners filed a timely appeal. On April 17, 2001, by Memorandum Decision, the Court of Appeals for the Ninth Circuit affirmed. It found the arbitrator did not reach issues outside of the settlement agreement, did not exceed his authority, and was not biased to the point of providing a basis to challenge the award.

Further, *granting Respondents' request for sanctions,* the Ninth Circuit determined Petitioners' appeal was frivolous. The Court stated, "We agree that appellants, failing to recognize our very limited review of arbitration awards, have advanced a meritless challenge to the district court's orders." It imposed sanctions under 28 U.S.C.

§§1912 and 1917, and under Federal Rule of Appellate Procedure 38, awarding EN "its reasonable attorneys' fees and costs associated with this appeal."

REASONS FOR GRANTING WRIT

I. THE COURT OF APPEALS FOR THE NINTH CIRCUIT ERRED IN AFFIRMING THE DISTRICT COURT'S ACTION CONFIRMING THE ARBITRATION ORDER AND AWARD.

Petitioners Gary Ravet and Promark have no quarrel with the arbitration process. They willingly entered into arbitration or mediation in 1998 and in February of 1999. However, the arbitration process here was shot through not only with difficulties relating to conduct by the opposite side which should be of concern to the Federal courts generally, but also with gross misconduct by the Arbitrator which should be of special concern to this Court.

What ensued in this situation was a series of mediations, arbitrations, and court filings and proceedings in which Promark sought to dissolve the purchase arrangement and return to independent status. These matters became more contentious as EPI played fast and loose with agreements, commitments and procedures, eventually--with the willing assistance of the arbitrator—fundamentally affecting Promark and Mr. Ravet's due process rights.

The validity a this arbitration and settlement was affected by Respondent EPI's conduct, its obvious fraud committed upon Mr. Ravet and Promark in not revealing the cancellation of a crucial business contract which was a part of that February, 1999 settlement, the bias of the

Arbitrator as indicated in the April 1, 1999 proceeding, and the outright denial of fairness, impartiality, and due process which prevailed in the August, 1999 proceeding. Neither the District Court nor the Ninth Circuit was interested in scrutinizing the proceedings. Nevertheless, judicial oversight of arbitration proceedings provided by the Federal Arbitration Act and this Court's longstanding concern for due process require that this Court grant this Petition and confirm that such interests arc not subordinate to any judicial tendency to confirm arbitration awards in order to end a case.

There is a general standard of judicial deference to arbitration awards, That is, courts should uphold an arbitrator's award so long as the arbitrator is "even arguably construing or applying the contract and acting within the scope of his authority." *Pacific Reinsurance v. Ohio Reinsurance,* 935 F.3d 1019 (9th Cir. 1994). Yet the FAA contemplates situations where the arbitrator does exceed the scope of his authority. The Act gives a District Court the authority to vacate arbitration awards if there is fraud, partiality or corruption, arbitrator misconduct or lack of jurisdiction, See 9 U.S.C. §10(a)(1) to (3). Courts also may modify awards if arbitrators have ruled on a matter not submitted to them, exceeded their powers, or so imperfectly executed their powers that a mutual, final, and definite award on the issues is not made. 9 U.S.C. §l0(a)(4).

There should be little doubt that in the telephone conference of August 6, 1999, the Arbitrator established his bias against Petitioners. It is manifest that in the proceedings of August 9, 1999, the Arbitrator did not act with impartiality, insisted on conducting arbitration proceedings without Petitioners present, and issued an Order deliberately punitive to Petitioners including rulings on issues never

submitted to the Arbitrator. In addition, there was no clause in the settlement agreement, nor any agreement in the District Court (before Judge Whalen) that the parties agreed to an arbitration on April 1, 1999 or in fact at any time after February, 1999.

As this Court has stated, arbitration is a mater of 'consent not coercion." Parties arc generally free to structure their arbitration agreements as they see fit. "Just as they may limit by contract the issues which they will arbitrate. . . .so too may they specify by contract the rules under which arbitration will be conducted." *Volt Information Services, Inc.* v. *Board of Trustees of Leland Stanford Junior University,* 489 U.S. 468 (1989), at 479. In addition, arbitration agreements would be severely affected if an arbitrator had the power to determine his own jurisdiction. See *AT&T Technologies, Inc. v. Communication Workers of America,* 475 U.S. *643* (1986).

A. Due Process and Arbitration Proceeding

Rare indeed is a circumstance where the interests of due process are served if a proceeding affecting a party is conducted in the absence of that party. Even more rare is a circumstance where the interests of due process are served if the presiding officer of that proceeding conducts the proceeding after denying a recusal demand by the now-absent party.

It is beyond Petitioners' understanding how the District Court could confirm the arbitration award, and the Ninth Circuit could affirm that action, after the Arbitrator so obviously ran roughshod over Petitioners' due process rights. it is well settled that "in almost every setting where important decisions turn on questions of fact, due process requires an opportunity to confront and cross-examine

witnesses." *Goldberg v. Kelly,* 397 U.S. 254 (1970).

In arbitration, an arbitrator has the duty to grant the parties a fundamentally fair hearing, *Bell Aerospace Co., etc.* v. *International Union, United Auto., etc.,* 500 F.2d 921 (2nd Cir. 1974). A fair hearing must meet minimal requirements of fairness, including adequate notice, and a fair opportunity to be heard on the evidence. A federal* court may vacate an arbitration award under FAA § 10(a) if the arbitrator refused to hear pertinent and material evidence which action prejudices the rights of the parties and denies a fair hearing. *Robbins v. Day,* 954 F.2d 679 (9th Cit. 1997). And see *Tempo Shain Corp v. Bertek, Inc.,* 120 F.3d 16 (2nd Cir. 1997) (hearing should have been postponed when panel refused to continue hearings to allow a witness who was only witness on particular issue of fraud, to testify); *Totem Marine Tug & Barge, Inc.* v. *North American Towing, Inc.,* 607 K2d 649 (5th Cir. 1979) (ex parte receipt of evidence by arbitrators op amount of award was prejudicial misbehavior); *Riko Enterprises, Inc. v. Seattle Supersonics Corp.,* 357 F.Supp. 527 (S.D.NY. 1973) (professional basketball commissioner's arbitration award in dispute between two teams would be vacated where evidence showed arbitrator did not conduct hearing and not allow party charged with misconduct to submit evidence to rebut charges); *Cofinco, Inc.* v. *Bakrie & Bros.* NV, 395 F.Supp. 613 (S.D.N.Y. 1975) (failure of arbitration panel to consider pertinent evidence violated 9 U.S.C. §10(c)), and *Teamsters, Chauffers, etc. v. ED. Glapp Corp.,* 551 F.Supp. 570 (N.D.N.Y. 1982), *aff'd without opn.,* 742 F.2d 144 (union entitled to vacate award where arbitrator refused to hear union's evidence). See generally, Domke, M., *Domke on Commercial Arbitration* (West, 2000), at *§34:05.*

Due process in any proceeding requires that the proceeding appropriate, fair, and adequate. 16B Am.Jur.2d Constitutional Law (Rev.) §953 et seq. The timing and nature of a required hearing under the Due Process Clause "will depend on an appropriate accommodation of the competing interests involved, including the importance of the private interest and length or finality of deprivation, likelihood of government error, and magnitude of governmental interests involved." It must be "an orderly proceeding, adapted to the nature of the case, in which the person affected has an opportunity to defend, enforce, and protect his or her rights." Am.Jur. §954.

Such a hearing, at a minimum, includes the presence of the parties or their counsel. "The right of a party to a civil action to be represented by counsel before the court upon the law and before the jury as to facts at all stages of the trial is unquestioned, and the arbitrary refusal of any court to hear a party by counsel employed by and appearing for him or her would be a denial of a hearing and in a constitutional sense a denial of due process." 40 Am.Jur. 2nd at §955.

Further, due process "requires that a party that may be affected by a proceeding shall have the right to raise such issues or set up any defense which he or she may have in the cause." A hearing "which does not give the right to interpose reasonable and legitimate defenses cannot constitute due process of law." See, e.g., *Halt v. Virginia*, 381 US. 131 (1965); *Lindsey v. Normet*, 405 U.S. 56 (1972), and *Fernell v. Southall Realty*, 416 U.S. 363 (1974).

Entering a judgment against a party should not be a "sanction" against a party or counsel's failure to appear.

When a party inexcusably fails to timely appear for trial, the "court may hear evidence and render judgment as if the case were in default, but failure to appear is not itself sufficient grounds for taking judgment by default." Therefore, "where a defendant has filed an answer, the fact that he or she does not appear for trial does not entitle the plaintiff to a judgment without proof of the facts constituting his or her cause of action, unless the facts submitted by the defendant in his or her answer make out a prima' fade case in plaintiffs favor." 40 Am. Jur.2d .*Judgments* (Rev.) §285.

There was never any doubt that Petitioners would have appeared at and participated in an arbitration proceeding that was impartial and properly conducted. Petitioners do not challenge the general rule that given the appropriate context of an arbitration proceeding and within the confines of due process, an arbitrator has wide latitude in conducting an arbitration and receiving evidence, and is not bound by federal rules. See *Flender Corp. v. Techna Quip Co.*, 953 F.2d 273 (7th Cir. 1992).

This was a materially different situation. The Arbitrator informed Petitioners in the telephone conference that he had no intention of conducting a proceeding which would satisfy their concerns. The Petitioners thus had no choice not only but to decide to accept a previous settlement proposal of May, 1999 at the 11th hour, and also to decline to participate in the arbitration proceeding. Petitioners assumed that given these events the Arbitrator would not conduct the proceeding, declaring the arbitration moot. Instead, the Arbitrator conducted the proceeding in their absence, engaged in several comments confirming his bias and lack of impartiality, and issued an order deliberately designed to be punitive to Petitioners, including determinations on issues or matters which were never

submitted to the Arbitrator in the first place.

This is not, and can never be, due process under the Constitution, even under the relaxed standards of procedure and evidence typical of arbitration. Petitioners urge this Court to grant this Petition to confirm due process standards which must apply in arbitration proceedings under the FAA.

B. Arbitrator 's Bias and Prejudice

Connected to the question of due process is the issue of bias and prejudice of the Arbitrator. The FAA expressly permits arbitration awards to be vacated due to such Arbitrator misconduct. The District Court and the Ninth Circuit incorrectly found that such bias did not exist or that Petitioners did not allege or show "specific facts" as to bias. The "specific facts" are the transcript of the August 6, 1999 telephone conference, the transcript of the August 9, 1999 arbitration proceeding, and the Order itself.

The applicable standard of "evident partiality" of an arbitrator is satisfied if "a reasonable person" would conclude that the arbitrator was partial to one party. See *Morelite Construction Co. v. New York City, District Council of Caqienters Beneficial Funds*, 748 F.2d 79 (2nd Cir. 1984). The standard also is satisfied by some "oven misconduct or demonstration of partiality." *Standard Tankers Co. v. Motor Tank Vessel, Akti*, 438 F.Supp. 143 (E.D.N.Car, 1977).

Here, the Arbitrator's bias was blatant. This was far more than "mutual dislike" between an arbitrator and a party or an arbitrator's "rudeness or abrasiveness." See respectively, *Cook Chocolate Co. v. Salomon., Inc.*, 748 F.Supp. 122 (S.D.N.Y. 1990), and *Fairchild & Co. v. Richmond*, F&P R.R., 516 F.Supp. 1304 (D.D.C. 1981). In

the telephone conference of August 6, 1999, the Arbitrator made outright accusations against Mr. Ravet, branded him as renegade litigator, and indicated that the Arbitrator would conduct the proceeding as he saw fit regardless of the fairness concerns expressed by Mr. Ravet for himself and for Promark. The bias was evident, was plain to an average lay person, and required that the award be vacated.

C. Arbitrator Dispensing His Own Brand of "Industrial Justice"

Even error committed by an arbitrator will riot be a basis for overturning the decision, as long as the arbitrator is "arguably construing or applying the contract and acting within the scope of his authority." See *Garvey v. Roberts*, 203 F.3d 580 (9th Cir. 1999). Yet, as this Court has stated, this general rule does not apply if the arbitrator "dispenses his own brand of industrial justice." *United Steelworkers of America v. Enterprise Wheel & Car Corp.*, 363 U.S. 563 (1960) at 567.

Respondent contended in its brief before the Ninth Circuit that this objection by Petitioners was precluded because it supposedly was not raised below. Yet Petitioners fairly presented to the District Court a host of contentions that the Arbitrator had acted in a biased, improper, and unacceptable manner violating the standards of the FAA and that he exceeded his authority in deciding issues not before him. These claims qualify under the heading of an arbitrator dispensing his or her own brand of industrial justice.

Respondent also contended in their brief that this objection arises only in the context of arbitrating collective bargaining agreement disputes. Yet there is nothing in this Court's decision in Enterprise Wheel that restricts the concern about an arbitrator dispensing his own brand of

justice, industrial or not, to labor matters.

The Arbitrator decided that he would determine solely for himself, regardless of the evidence and even in the absence of parties to the litigation, what was appropriate and how to address the issues before him. He dispensed his "own brand of justice" in the rulings he made on the issues supposedly before him along with rulings on issues not properly before him (such as punishing Petitioners for their allegedly "vexatious" conduct).

This arbitration proceeding should never have been confirmed if the FAA is to have any meaning. This Court should grant this Petition to confirm judicial authority over arbitration proceedings and to ensure that fairness and scrutiny, rather than dismissive attitude and expediency, will govern judicial scrutiny of arbitration orders.

D. Arbitrator's Authority and Issues for Decision

All of these issues must be considered in the larger context of whether arbitration itself was proper. In an arbitration, it is axiomatic that no order can issue binding a party who did not *already agree* to be bound by arbitration. This is not a situation where a party signed a contract or agreement containing an arbitration clause, making the agreement to conduct arbitration a material element of the bargain.

These two parties continued in an ongoing effort to settle their differences, punctuated by various proceedings. What caused the proceedings to continue was not "vexatiousness" by Mr. Ravet and Promark, but EPI's continued resistance to an appropriate settlement. The February, 1999 eight-point agreement supposedly included a "binding" arbitration aspect. But that aspect of the

agreement, as well as the agreement itself, only had strength and validity if it was the product of good faith, fair dealing, and proper conduct by both sides. That was not the case. Despite the findings by the Arbitrator and the District Court to the contrary, EPI's fraud in concealing the cancellation of a crucial contract which expressly was made part of the eight-point arrangement put the entire process in stasis. There was no further arbitration to engage in, because the arbitration process had been torpedoed by EPI's conduct. Thus, there was no arbitration order of May, 1 999 to confirm and no additional arbitration issues to be considered by the Arbitrator in August, 1999.

Therefore, Mr. Ravet and Promark were well within their rights in refusing to be bound by the arbitration and "settlement." It has been held that a person who appeared at an arbitration hearing to defend the interests of his corporations, but objected to being bound personally by the arbitrator's rulings, was not so bound. *Ralph Andrews Productions, Inc. v. Writers Guild,* 938 F.2d 128 (9th Cir. 1991).

This Court has held similarly. in *First Options of Chicago, Inc. v. Kaplan,* 514 U.S. 938 *(1995),* this Court stated that whether arbitrators or courts have the "primary power" to decide whether the parties agreed to arbitrate a dispute is "fairly simple" and turns upon whether the parties have agreed to submit the question to arbitration. If they have not, the court should decide the question independently. The conclusion "flows inexorably from the fact that arbitration is simply a matter of contract between the parties." 514 U.S. at 940.

As this Court added in *Kaplan,* who has the "primary authority" over a dispute "can make a critical

difference to a party resisting arbitration." 514 U.S. at 942. Resolving that question in favor of the Kaplans, who contended that the very issue of whether they agreed to arbitration cannot be decided by an arbitrator, the Court noted that since the Kaplans were "forcefully objecting" to an arbitrator as the primary authority, "ore naturally would think that they did *not* want the arbitrators to have binding authority over them," 514 U.S. at 946, emphasis retained. Thus, the entire issue of whether arbitration should he conducted was a matter for the court, not for the arbitrator.

It therefore has been noted that "Under the FAA, a court will decline to enforce an award where arbitrator exceeded the contractual authority by arbitrating issues not submitted by the parties and where the arbitrators so exceeded their powers that a mutual, final and definite award upon the subject matter was not made." *Domke on Commercial Arbitration, supra,* §34:06. This provision applies when arbitrators "decide issues not presented to them or grant relief not authorized in the arbitration agreement."

A court in deciding this issue focus on whether the arbitrators had authority to reach a certain issue, not whether that issue was correctly decided. *DiRussa v. Dean Witter Reynolds, Inc.*, 121 V.34 S18 (2nd Cir. 1997). And see, *Madison Hotel v. Hotel & Restaurant Employees, Local 25,* 128 F.3d 743 (D.C. Cir. 1997) (arbitrator exceeds authority by awarding unrequested item of damages substantially larger than claimed in submission of issues); *Swift Industries, The, v. Botany Industries, Inc.*, 466 F.2d 1125 (3rd Cir. 1972) (arbitrator exceeds authority by awarding remedy not contemplated by arbitration agreement); *Amanda Bent Bolt Co.* v. *International Union, United Automobile, Aerospace & Agricultural Implement*

Workers, 451 F.2d 1277 (6th Cir. 1971) (same); *Bruce Harwood Floors v. UBC, Southern Council of Industrial Workers,* 103 F.3d 449 *(5th* Cir. 1997) (arbitrator exceeds authority by fashioning remedy not contained in agreement by adding to, amending, or departing from terms of agreement), and *NCR Corp.* v. *Sac-Co., Inc., 45* F,3d 1076 (6th Cir. 1995) (arbitrator exceeds authority in resolving dispute which may not have existed between parties).

The Arbitrator here vastly exceeded his authority, assuming the authority existed at all and there remained an actual agreement between the parties to arbitrate. Even at that point, the Arbitrator refused to consider that his authority may have been affected by the contentions of Mr. Ravet and Promark that they had accepted EPI's prior settlement offer of May, 1999. If there was any doubt about that, the Arbitrator did not postpone proceedings for the District Court to determine if this acceptance of the settlement offer was valid and if the arbitration proceedings thus had been mooted. The Arbitrator merely decided that acceptance of a settlement offer does not prevent the arbitration proceeding from continuing--a decision which, now that it has been confirmed by the District Court and affirmed by the Ninth Circuit, could have a chilling effect upon settlements in arbitration matters.

Finally assuming the Arbitrator somehow was correct in all of these matters, he exceeded his authority by raising, considering, or deciding issues not presented to him in the context of' the District Court proceedings which led to this arbitration session. Those issues to be formally considered (assuming arbitration was being properly invoked) were the four remaining issues from the eight-point settlement. Instead, the Arbitrator decided to take the opportunity to act in a punitive manner to Petitioners for

daring to suggest that the entire proceedings were stacked, biased, and predetermined. The Arbitrator thus made rulings on issues such as barring Petitioners from further litigation without the permission of the Arbitrator, an extraordinary directive extremely rare in our jurisprudence.

Everything about this process, from the fraud in the February, 1999 proceeding, through the various District Court's review to the disastrous situation in August, 1999 and the draconian Order which followed, demands proper judicial examination under the FAA Instead, Petitioners were treated to offhand review by the District Court and perfunctory affirmance by the Ninth Circuit. (Further, Petitioners' appeal to the Ninth Circuit was not frivolous. Although not raised as an issue upon which this Petition should be granted, should this Court grant this Petition and review this case, Petitioners request that this Court, among other things, vacate the Ninth Circuit's decision to impose sanctions upon Petitioners.)

This is not the stuff of acceptable arbitration or appropriate judicial review under the Act. This Court thus should grant this Petition to: reassert the importance of due process in arbitration proceedings, decide that an arbitration proceeding conducted in the absence of a party is fundamentally flawed and presumptively unfair, declare that an arbitrator cannot with impunity declare his partiality if the award is to be affirmed, determine that an arbitrator's authority must be clarified by a District Court if challenged by a party, establish that an arbitration proceeding is not a platform to pillory a party and issue punitive edicts, and reassert that an arbitrator's authority--if it exists and is properly invoked--is limited to issues before the arbitrator.

Most importantly, this Court should manifestly establish that the Federal court are not mere turnstiles when it comes to judicial review of arbitration awards under the Act, despite the narrow review contemplated by the Act and despite the policy favoring arbitration. The Act does not require the courts to look for ways to affirm an arbitration award if it is clearly affected by the concerns identified by the Act. Judicial review remains an essential step in ensuring the fairness, appropriateness, and impartiality of arbitration process if that process is to be maintained.

CONCLUSION

THEREFORE, Petitioners GARY RAVET and PROMARK, INC. request of this Court that it GRANT its Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

RESPECTFULLY SUBMITTED,

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No. 99-56801, No. 99-56817

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

ENTERTAINMENT PUBLICATIONS, INC., a Michigan corporation, Plaintiff-Appellee,

v.

GARY RAVET, an individual; PROMARK INC., a California corporation, Defendants-Appellants. PROMARK INC., a California corporation; RAVET ENTERPRISES, a California corporation; GARY K. RAVET, a California resident, Plaintiffs-Appellants, v. ENTERTAINMENT PUBLICATION INC., a Michigan corporation; ALAN BITTKER, a Michigan resident; MARIANNE ROBERGE, a Michigan resident; ANGELA HRIBAR, a Michigan resident; MARSHA KATZ EISENBERG, a Michigan resident; JEANNE CHAPMAN; RICHARD WOLF, a New Jersey resident, Defendants-Appellees.

April 5, 2001 **, Submitted, Pasadena, California

** The panel is of the unanimous opinion that this case is suitable for disposition without oral argument. Fed. R. App. P. 34(a)(2).

April 17, 2001, Filed

NOTICE:

RULES OF THE NINTH CIRCUIT COURT OF APPEALS MAY LIMIT CITATION TO UNPUBLISHED OPINIONS. PLEASE REFER TO THE RULES OF THE UNITED STATES COURT OF APPEALS FOR THIS CIRCUIT.

PRIOR HISTORY:
Appeal from the United States District Court for the Southern District of California. D.C. No. CV-98-2306 TW (RBB), D.C. No. CV-99-1081 TW (RBB). Thomas J. Whelan, District Judge, Presiding.

COUNSEL:
For ENTERTAINMENT PUB, Plaintiff-counter-defendant - Appellee (99-56801): Philip L. Siracuse, Esq., Benjamin G. Shatz, Esq., James D. DeRoche, Esq., CROSBY, HEAFEY, ROACH & MAY, Los Angeles, CA.

For GARY RAVET, PROMARK INC, Counter-claimants - Appellants (99-56801): Patrick D. Webb, Esq., WEBB & CAREY, San Diego, CA.

GARY RAVET, Defendant - Appellant (99-56801), Pro se, La Jolla, CA.

For PROMARK INC, Defendant - Appellant (99-56801): Gary K. Ravet, Esq., La Jolla, CA.

For CENDANT CORPORATION, ALAN BITTKER, RICHARD WOLF, JEANNE CHAPMAN, MARIANNE ROBERGE, Counter-defendants - Appellees (99-56801): No Appearance.

For CENDANT CORPORATION, ALAN BITTKER, RICHARD WOLF, JEANNE CHAPMAN, [*2]

MARIANNE ROBERGE, Counter-defendants - Appellees (99-56801): Benjamin G. Shatz, Esq., James D. DeRoche, Esq., CROSBY, HEAFEY, ROACH & MAY, Los Angeles, CA.

For PROMARK INC., RAVET ENTERPRISES, GARY K. RAVET, Plaintiffs - Appellants (99-56817): Gary K. Ravet, Esq., La Jolla, CA.

For ENTERTAINMENT PUBLICATION INC., CENDANT CORPORATION, ALAN BITTKER, MARIANNE ROBERGE, ANGELA HRIBAR, MARSHA KATZ EISENBERG, JEANNE CHAPMAN, RICHARD WOLF, Defendants - Appellees (99-56817): Benjamin G. Shatz, Esq., James D. DeRoche, Esq., CROSBY, HEAFEY, ROACH & MAY, Los Angeles, CA.

JUDGES:
Before: BOOCHEVER, SILVERMAN, Circuit Judges, and GEORGE, *** District Judge.

*** The Honorable Lloyd D. George, Senior United States District Judge for the District of Nevada, sitting by designation.

In this consolidated appeal, appellants Gary Ravet [*3] and his corporation, Promark Inc., appeal the district court's orders affirming the arbitration awards and terminating the related cases. Because the parties are familiar with the facts, we will not set them out in detail. This court has jurisdiction to review the district court's final orders under 28 U.S.C. § 1291, and we affirm.

On appeal, appellants contend that the district court erred in affirming the arbitration awards because the

arbitrator exceeded his authority by deciding issues outside the scope of the parties' settlement agreement. We disagree. Consistent with the strong public policy favoring arbitration, this court will not disturb an arbitration order so long as the arbitrator "even arguably construed or applied the contract and acted within the scope of his authority." Pacific Reinsurance v. Ohio Reinsurance, 935 F.2d 1019, 1024 (9th Cir. 1994). While appellants disagree with several of the arbitrator's determinations, they offer no evidence demonstrating that the arbitrator exceeded his broad authority. Accordingly, their claim fails.

Appellants also argue that the arbitrator was biased and therefore denied them a full and fair opportunity to advance their claims. However, appellants have failed to produce specific facts demonstrating the arbitrator's bias. See Arizona Elec. Power Co-op v. Berkeley, 59 F.3d 988, 993 (9th Cir. 1995). Although the arbitrator expressed disappointment with Ravet's conduct during this litigation, the arbitrator's criticism was not unwarranted nor did it rise to the level of personal animus. See Air-Sea Forwarders, Inc. v. Air Asia Co., 880 F.2d 176, 191 (9th Cir. 1989). Indeed, the record reflects that the arbitrator showed remarkable impartiality, even in the midst of Ravet's personal attacks.

Appellee EPI requests sanctions under 28 U.S.C. § § 1912, 1917 and Federal Rule of Appellate Procedure 38. We agree that appellants, failing to recognize our very limited review of arbitration awards, have advanced a meritless challenge to the district court's orders. See Rostad & Rostad Corp. v. Investment Management & Research, 923 F.2d 694, 696-97 (9th Cir. 1991). Accordingly, we award EPI its reasonable attorneys' fees and costs associated with this appeal.

AFFIRMED.

OPINION:

MEMORANDUM *

----------Footnotes----------

* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as may be provided by 9th Cir. R. 36-3.

No. 99-56801, No. 99-56817

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

ENTERTAINMENT PUBLICATIONS, INC., a Michigan corporation, Plaintiff-Appellee,

v.

GARY RAVET, an individual; PROMARK INC., a California corporation, Defendants-Appellants. PROMARK INC., a California corporation; RAVET ENTERPRISES, a California corporation; GARY K. RAVET, a California resident, Plaintiffs-Appellants, v. ENTERTAINMENT PUBLICATION INC., a Michigan corporation; ALAN BITTKER, a Michigan resident; MARIANNE ROBERGE, a Michigan resident; ANGELA HRIBAR, a Michigan resident; MARSHA KATZ EISENBERG, a Michigan resident; JEANNE CHAPMAN; RICHARD WOLF, a New Jersey resident, Defendants-Appellees.

June 28, 2001

Aplts's req for lv to file a late pet for rhrg is granted; the pet, dated 4/30/01, is accepted as timely. However, aplt's pet for rhrg is DENIED

9 USCS § 1

*** CURRENT THROUGH P.L. 107-45, APPROVED 10/1/01 ***

TITLE 9. ARBITRATION
PROVISIONS

§ 1. "Maritime transactions" and "commerce" defined; exceptions to operation of title

"Maritime transactions", as herein defined, means charter parties, bills of lading of water carriers, agreements relating to wharfage, supplies furnished vessels or repairs to vessels, collisions, or any other matters in foreign commerce which, if the subject of controversy, would be embraced within admiralty jurisdiction; "commerce", as herein defined, means commerce among the several States or with foreign nations, or in any Territory of the United States or in the District of Columbia, or between any such Territory and another, or between any such Territory and any State or foreign nation, or between the District of Columbia and any State or Territory or foreign nation, but nothing herein contained shall apply to contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce.

28 USCS § 1912

TITLE 28. JUDICIARY AND JUDICIAL PROCEDURE
PART V. PROCEDURE
CHAPTER 123. FEES AND COSTS

28 USCS § 1912 (2001)

§ 1912. Damages and costs on affirmance

Where a judgment is affirmed by the Supreme Court or a court of appeals, the court in its discretion may adjudge to the prevailing party just damages for his delay, and single or double costs.

Section 1917. District courts; fee on filing notice of or petition for appeal

Upon the filing of any separate or joint notice of appeal or application for appeal or upon the receipt of any order allowing, or notice of the allowance of, an appeal or of a writ of certiorari $5 shall be paid to the clerk of the district court, by the appellant or petitioner.

Federal Rule of Appellate Procedure 38:

RULE 38. Frivolous Appeals--Damages and Costs

If a court of appeals determines that an appeal is frivolous, it may, after a separately filed motion or notice from the court and reasonable opportunity to respond, award just damages and single or double costs to the appellee.

Supreme Court, U.S.
FILED

011052 JAN 17 2002

OFFICE OF THE CLERK

No.

In the

Supreme Court of the United States

GARY RAVET and PROMARK INC.,

Petitioners,

v.

ENTERTAINMENT PUBLICATIONS, INC.,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

SUPPLEMENTAL APPENDIX

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16 pp

UNITED STATES DISTRICT COURT SOUTHERN DISTRICT OP CALIFORNIA

CASE NO: 98-CV-2306 TW (RBB)

ENTERTAINMENT PUBLICATIONS, INC.,
a Michigan Corporation
Plaintiff,

vs.

GARY RAVET, an individual, PROMARK, INC.,
a California Corporation
Defendants.

Filed October 26, 1999

ORDER GRANTING PLAINTIFF'S MOTION TO CONFIRM ARBITRATION AWARDS; DENYING MOTION FOR SANCTIONS; DENYING APPLICATIONFOR TEMPORARY RESTRAINING ORDER; TERMINATING CASE

Plaintiff Entertainment Publications, Inc. ("EPI") moves for an order confirming sever al arbitration awards issued by the Honorable Layn R. Phillips, U.S. District Court Judge (retired). Defendants Gary Ravet and Promark, Inc. oppose. All parties are represented by counsel. For the reasons expressed below, the court GRANTS EPI's motion.

I. BACKGROUND

The following facts are largely taken from *the* court's order dated July 6, 1999. On June 11, 1998 EPI and Promark executed an *asset* purchase agreement in which EPI acquired substantially all the assets of Promark, Inc. ("Promark"),

including its trade name and an employment agreement with Promark's owner. Gary Ravet ("Ravet"). Within a few months, the employment relationship between EPI and Ravet deteriorated, leading to the termination of Ravet's employment.

On December 22, 1998 EPI filed *this* action against Ravet and Promark alleging claims sounding in breach of contract and trademark infringement. On February *2,* 1999 the parties stipulated to a voluntary mediation in San Diego, California, to take place on February *9* and 10, 1999 before the Honorable Layn Phillips, a retired United States *District* Judge. At the February 9, 1999 mediation, the parties agreed to a settlement that included the mutual release of liability and dismissal with prejudice of all pending litigation between the parties. The settlement also included a provision requiring disputes arising out of the settlement agreement to be resolved by Judge Phillips in binding, non-appealable arbitration.

Subsequent disagreements arose between the parties such that the February 1999 settlement agreement was never executed. Both EPI and Ravet contend that they made efforts to abide by the agreement but such efforts were thwarted by renegotiation and delay on both tides.

On May 21,1999 defendants filed a 46-page complaint in San Diego Superior Court asserting claims for-fraud, misrepresentation, breach of contract, and economic interference. The allegations in the complaint arise from EPI's conduct occurring during and prior to the February 1999 settlement negotiations. Specifically, Ravet and Promark's injuries stem from EPI's alleged misconduct in connection with various agreements between the parties, including (1) an asset purchase agreement, (2) an employment agreement, (3) a license agreement, and *(4)* a bonus agreement. Additionally, Ravet and Promark claimed various other injuries arising out of the February 1999

settlement agreement. *On* May 25, 1999 EPI removed defendants newest action to this court *the* basis of diversity of citizenship. Promark, Inc. v. Entertainment Publications Inc, No. 99-CV-1081 TW (RBB) ("Promark").

Shortly thereafter EPI moved to compel arbitration in both this action, and in the more recently filed Promark matter. On July 6, 1999 the court issued separate orders granting EPI's motions to compel arbitration. Pursuant to those orders, the parties scheduled another arbitration for August 9, 1999. On July 21, 1999 the arbitrator's office confirmed the parties' arrangements in writing and set a briefing schedule. Both sides submitted arbitration briefs in support of their respective positions. In addition, the Arbitrator scheduled a conference call for Friday, August 6, 1999 in order establish the protocol for the following Monday's hearing.

Both parties attended the August 6, 1999 conference call and neither side expressed an intention of not attending the August 9, 1999 arbitration. Later that same day, Promark and Rivet filed an emergency ex parte application seeking an order removing Judge Phillips *as* the parties arbitrator. By order dated August 13, 1999 the court wholly denied defendants' ex parte application finding their "last minute attempt to circumvent a court ordered arbitration that all parties have known about since at least July 6, 1999 had failed in all respects? (Aug. 13, 1999 Order Denying Plaintiffs' Ex Parte Application at 5).[1]

On the morning of Monday, August 9, 1999 EPI attended the arbitration before Judge Phillips. Notably absent from the arbitration was any representative appearing on behalf of Promark or Ravet. The primary reason offered by Promark and Ravet for not attending the arbitration was that they had purportedly elected, just minutes before the arbitration was set to begin, to accept EPI's May 13, 1999 proposal regarding the February 9-10, 1999 settlement.

According to Ravet, "acceptance" of EPI's May13 proposal rendered the arbitration proceedings moot and resolved all differences between the parties.

Notwithstanding defendants' election to *not* participate in *the* arbitration, Judge Phillips issued a Confidential Arbitration Order later that same *day* establishing what EPI contends are the settlement terms between the parties. (Deroche Decl. Ex. I). The August 9, 1999 Arbitration Order also held:

> The action entitled Inc. v. Entertainment Publications Inc., USDC Southern District Case No. 99-CV-1O8 11W (RBB) is barred in its entirety by the release contained in the settlement agreement the concessions made by Ravet in his sub missions to the Arbitrator, the prior rulings of *this* Arbitrator including its May 10, 1999 Order, the transcript of August 9,1999 and this Order.

(Deroche Decl. Ex. I. at 2)

Shortly after the August 9, 1999 arbitration, Ravet informed EPI in writing that be had no intention of complying with Judge Phillips' Arbitration Orders. (Deroche Decl. Ex K). On August 16, 1999 EPI requested that Promark and Ravet stipulate to the confirmation of the arbitration awards. Promark and Ravet refused. (Deroche Decl. Ex. L). EPI now moves to confirm all prior arbitration awards between the *par* seeking a court order directing the parties to abide by the terms of Judge Phillips' prior rulings.

II. LEGAL STANDARD

In the Ninth Circuit, judicial review of an arbitration award is limited and highly deferential" Sheet Metal Workers' Int'l Sass's v. Madison Indus., Inc., 84F.3d 1186, 1190 (9th Cir. 1996) ("Sheet Metal"). A district court must uphold the findings of the arbitrator so long as *they* are plausible. Tri-Star Pictures, Inc. v. Director's Guild of Am. Inc., 160 F.3d 537, 540 (9thCir. 1998). An arbitration award will not be set aside unless it manifests a complete disregard for the law Sheet Metal, 84F.3d at 1190. The award must be confirmed if the arbitrator even arguably construed or applied the contract and acted within his scope of authority. United Food & Int'l Union v. Foster Poultry Farms, 74 F.3d 169,173(9th Cir. 1995); Todd Shipyards Corp. v. Cunard Line, Ltd., 943 P.2d 1056, 1060 (9th Cir. 1991) (same); *A.G.* Edwards & Sons, Inc. v. McCollough, 967 F.2d 1401, 1403 *(9th* Cir. 1992) ("The courts should not reverse [an arbitration award} even in the face of erroneous interpretations of *the* law.").

III. DISCUSSION

Relying on the Federal Arbitration Act *9* U.S.C. S 9, EPI applies for an order confirming several arbitration awards issued by Judge Phillips. *The* specific awards for which EPI seeks confirmation are: (l)the awards entered on the record during an April 1, 1999 arbitration; (2) a May 10, 1999 written award; (3) an August 9, 1999 written award; and (4) an August 15, 1999 award. Promark and Rivet oppose on the ground that the arbitration awards have been rendered moot and unenforceable ba5ed on their purported acceptance of EPI's May 13, 1999 proposal regarding the February 9-10, 1999 settlement just minutes before commencement of the August 9, 1999 arbitration hearing.

A. CONFIRMATION OF ARBITRATION AWARDS

"It is generally held that an arbitration award will not be set aside unless it evidences a manifest disregard for law. Todd Shipyards, 943 F.2d at 1060; First. Options of Chicago, Inc. v. Kaplan 514 TJ.S. 938, 942, 115 S. Ct. 1920, 1923 (1995). Indeed "arbitrators are not required to state the reasons for their decisions.' United Steelworkers of America v. Enterprise Wheel & Car Carp, 363 U.S. *593,* 598, 80 S. Ct. 1358, 1361, 4 L.Ed.2d 1424 (1960); Kaiser *Cement* Corp. v. Fischbach and Moore, Inc., 793 F.2d 1100, 1102 n.6 (9th Cir. 1986). The rule that arbitrators need riot state their reasons presumes the arbitrators took a permissible route to the award where one exists. Sargent v. Paine Webb Jackson & Curtis Inc., 882 F.2d 529, 532 (D.C. Cit. 1989). As stared by the Ninth Circuit:

> (A]n award such as this, which is one within the terms of the submission, will not be set aside by a court for error in law or fact.. Arbitrators are judges chosen by the parties to decide the matters submitted to them, finally and without appeal. As a mode of settling disputes, it should receive every encouragement from courts ... If the award is within the submission, contains the honest decision of the arbitrator, after a full and fair hearing of *the* parties, a court.. . will not set it *aside* for error, either in law or fact.

San Martine Compania DeNavegacion v Saguenay Terminals Ltd., 293 Fid 796, 800 (9th Cit. 1961) (quotations omitted). Accordingly, under the Federal Arbitration Act ("FAA"), an arbitration award is rarely overturned. Sheet Metal, 84 F.3d at

1190. Unless the party resisting confirmation can show that *the* awards violate the FAA or constitute a manifest disregard of the law, the court must confirm the awards. Id.

As previously held in the court's July 6,1999 orders, the parties expressly agreed to arbitrate any and all disputes arising from their February 1999 settlement Since then, two separate arbitrations have been held and multiple orders have been issued by Judge Phillips. "The first arbitration, a five hour session held on April 1, 1999, resulted in oral rulings on certain issues and request for further briefing as to others. (See Deroche Decl. EL A Transcript April 1, 1999 Proceedings)). On May 10, 1999 Judge *Phillips* issued a written "Confidential Arbitration Order Resolving Disputes Arising Out of Settlement." (Deroche Decl. Ex. B.) EL B) Among other things, Judge Phillps' order noted:

> Civil cases don't come nastier than this one While the lawyers in this case demonstrated excellent advocacy skills at every phase of the proceedings, the parties in this case, former business allies who now find themselves as courtroom adversaries, clearly hate each other, professional civility is on the decline, and the atmosphere at every hearing is dripping with personal *animosity.* With all of this background, *it* is amazing that, for one brief moment in February 1999, the parties were able to lay down their swords, set aside their differences and find common pound in the form of a mediated settlement... As part of the settlement, the parties agreed that, should any disputes arise out of either the finalization of the settlement documentation . . . those disputes, rather than going back to court, will be resolved before Judge Phillips] in final,

binding non-appealable arbitration."

(Deroche Decl. Ex. B at 1). By consenting to arbitration and absent a manifest disregard for the *law*, Promark and Ravet expressly surrendered any right they might otherwise have had to challenge the finality of the arbitration awards. Todd Shipyards, 943 F.2d at 1063-64; see also Mastrobuono v. Shearson Lehman Hutton, Inc., 514 U.S. 52, 115 S.Ct. 1212, 131 L.Ed.2d 76 (1995) (due regard must be given to federal policy *favoring* arbitration). Indeed, on *July* 6, 1999 this court ordered the parties to attend a subsequent arbitration before judge Phillips that was ultimately scheduled for and held on August 9, 1999.

B. DEFENDANT'S ELECTION TO NOT ATTEND THE AUGUST 9, 1999 ARBITRATION DID NOT ALTER THE VALIDITY OF JUDGE PHILLIPS' ORDERS

Ravet and Promark also suggest that their absence from the August 9, 1999 arbitration invalidates it result. The court disagrees. Unless otherwise agreed to, "procedural matters become part of the bundle of issues committed to decisions by the arbitrator," and an award should not be vacated on procedural grounds unless the procedure employed was a sham, substantially inadequate or substantially unavailable." Federal Deposit Ins. Corp. v. Air Florida Systems, Inc., 822 F.2d 833, 142 (9th Cir. 1987).

Defendants' last-minute refusal to participate in the court ordered arbitration that had been scheduled weeks in advance does nothing to alter the enforceability of Judge Phillips' ruling. The arbitration agreement itself was self-executing and did not vest Ravet or Promark with the authority to unilaterally withdraw from noticed arbitration

proceedings. The parties' agreement expressly required that "those disputes, rather than going back to court, will be resolved before Judge Phillips] in final, binding non-appealable arbitration." *(July* 6, 1999 Order at 6-7). Moreover, the time of their attempted withdrawal, Promark and Ravet were already subject to a direct order issued by this court which compelled attendance at the arbitration. Despite knowledge of the court's express mandate, Promark and Ravet disregarded the court's order by refusing to attend the August 9, 1999 arbitration. Promark and Ravet have not alleged or *even* suggested that they lacked proper notice or that the procedures adopted by Judge Phillips were a sham. The court therefore holds that Promark and Ravet's failure to appear at the August 9, 1999 arbitration does not in any way affect the validity of Judge Phillip's arbitration orders.

C. DEFENDANTS COULD NOT HAVE ACCEPTED EPI'S MAY 13, 1999SETTLEMENT PROPOSAL BECAUSE IT HAD ALREADY BEEN REJECTED, OR HAD EXPIRED BY ITS OWN TERMS

Promark and Ravet also argue that the arbitration was rendered moor by the purported acceptance of a settlement proposal originally offered by EPI on May 13, 1999. Specifically, Promark and Ravet contend that on the morning of August 9, 1999-just minutes before the arbitration to begin-they decided to "accept" EPI's May 13, 1999 proposal regarding the parties' February 9-10, 1999 settlement. Promark and Ravet contend that their acceptance of the May 13, 1999 proposal rendered any further arbitration between the parties moot and officially resolved any and all disputes between the parties.

Defendants' purported acceptance of EPI's May 13, 1999 proposal fails to abrogate the validity of Judge Phillips'

arbitration orders for at least four reasons. First, Promark and Ravet rejected the May 13, 1999 proposal only days later—and three months before their purported acceptance on August 9, 1999. In a letter dated May 17, 1999, Ravet wrote to EPI, "Congratulations! You and your clients have now successfully killed the proposed settlement of disputes. . . The parties are now back into litigation, with even more issues and causes of action than before?" (Kennedy Decl. ¶ 4, Ex. A). Although Ravet contends that he had not received the settlement papers at the time he wrote the letter, the letter clearly evinced that Ravet had no intention to accept any EPI settlement proposal *as* of May 17, 1999.

The next day, Ravet wrote a second letter to EPI, confirming that be considered EPI's terms "unacceptable." (Kennedy Decl. ¶5, Ex. B). Ravet stated that *his* prior version of the settlement agreement "set forth the exact terms and conditions . agreed upon by the parties on February 10, 1999" and that EPI had wrongfully "insisted on at least the following changes to the settlement agreement each of which is *unacceptable* to me." Id. (emphasis supplied). In three paragraphs of his letter, Ravet described various aspects of EPI's settlement proposal that he found unacceptable, including (1) the defective date of the agreement, (2) the identity of the payees on the settlement checks, and (3) the incorporation of judge Phillips' prior rulings. a Ravet's letter further insisted that "no agreement existed as of February 10, 1999" - a position completely inconsistent *with the May* 13 proposal which expressly incorporated the February 10, 1999 settlement. Ravet concluded his letter by stating *"I* would think that you and your client would have learned by now not to threaten or try to bully me. Doing so only serves to strengthen my resolve and fuel my determination." *Id.* Ravet's letter dearly communicated his intention to reject any and all settlement proposals offered by EPI. The court therefore finds the May *18,* 1999 letter expressly rejected EPI's *May* 13, 1999 settlement proposal.

Second, to punctuate the rejection of EPI's May 13, 1999 settlement proposal, Ravet, acting as his own attorney, made good on his threat and on May 21, 1999 filed a new action in San Diego-Superior Court entitled Promark, Inc. v. Entertainment Publications, Inc., Case No. 730997. (Def's Req. Jud. Notice, *Ex.* C). The new *action* contained no less than seventeen causes of action, including allegations of breach of the original employment and *asset* purchase agreements between the parties and the fraud in the inducement claim he had raised before, which had been previously rejected by Judge Phillips. Id. at 25:21 - 28:22; see also July 6, 1999 Order at 8-10). The *new lawsuit,* like *Ravet's May* 17 and May 18 letters, claimed that EPI had never intended to resolve the parties' differences - and represented yet another manifestation that Ravet had not accepted *any* previous settlement proposals. (Def's Req. Jud. Notice, Ex. C, at 24:5-8).

Third, on May 25, 1999 Rivet wrote another letter to EPI offering new settlement terms. (Kennedy Decl. ¶ 6, Ex. C). Specifically, Rivet sought more money and stated: "As you will recall, at the mediation between the parties that took place in February 1999,t was prepared to settle all disputes for $650,000. I am prepared to accept that *amount* now." *id.* However, Rivet's newest offer to settle was more than doable the $285,000 amount allegedly agreed upon by the parties in February 1999. It is well-settled that "[a] qualified acceptance or counteroffer constitutes a rejection of the original offer, and the original offer cannot thereafter be accepted by the offeree." 1 Witkin *Summary of* California Law, Contracts 190, at 201 (9th ed. 1987); Cal. Civil Code 1985 ("A qualified acceptance is a new proposal."); Panangotacos v. Bank of America, 60 Cal. App. 4th 861 (1998) (finding that offeree's inclusion -of additional: payment terms transformed purported acceptance into counteroffer) At minimum, Rivet's attempt to raise the ante in the parties' settlement negotiations was clearly a rejection and/or counter-offer to

EPI's original May 13, 1999 settlement proposal.

Finally, even assuming Promark and Ravet had not rejected the May 13, 1999 proposal, the proposal had expired long before. By its own terms, the May 13, 1999 settlement proposal called for a Closing Date" no later than May 17, 1999. As previously noted, Ravet's letters dated May 17, 18, and 25 clearly rejected or attempted to modify the express terms of EPI's settlement proposals. Moreover, the passage of time, as here, can result in the lapse of an offer. Cal. Civ. Code S 1587. Specifically, an offer is deemed revoked "by the lapse of a reasonable rime without communication of acceptance." Cal. Civ. Code § 1587(2). What constitutes a reasonable period of time is a question of fact, dependent on the circumstances *existing* when the offer and attempted acceptance are made. 1 Witkin Summary of California Law, Contracts §164, at 184(9th ed. 1987).

Here, the most compelling that the May 13 settlement proposal bad expired is the proposal's express requirement that the "Closing Date" be no later than May 17, 1999. (See Webb Decl., Ex. A. at ¶A.2). That paragraph expressly stated, "[t]he transaction contemplated by this agreement will close on May 17, 1999 (the 'Closing Date')." (Id.). Defendants' admitted failure to "accept" the *May* 13, 1999 proposal until August 9, 1999 -84 days after the day contemplated for performance – clearly exceeds any definition of a reasonable time to accept given that performance was originally called for by May 17, 1999.

In sum, the court finds that defendants' purported acceptance of EPI's May13 proposal on the morning of August 9, 1999 *was* invalid because the May 13 settlement proposal had expired or had been previously rejected, modified, or countered by Promark and Ravet. As such, Promark and Ravet's absence from the arbitration was unwarranted and without justification, and their purported acceptance did not render moor the August 9, 1999

arbitration.

D. CONFIRMATION IS WARRANTED

The Federal Arbitration Act specifically authorizes district courts to confirm arbitration awards where, as here, the parties' agreement establishes that the arbitrator's rulings are to be binding. *9* U.S.C. S 9; S Milwaukee Typographical Union N& 23 v. Newspapers, Inc., 639 F.2d 386, 389-90 (7th Cir. 1981) (contract providing that decision of the arbitrator shall be final and binding upon both parties held sufficient to imply consent to entry of judgment). in this case, the parties expressly agreed that all disputes would be resolved through "final, binding, non. appealable arbitration. . ." (July 6, 1999 Order at 7:8-12 (quoting Deroche Decl. Ex. A, at 13)).

A district court *must* uphold *the* findings *of* the arbitrator so long *as they are* plausible. Tristar Pictures, Inc. v. Director's Guild of Am. Inc., 160 F.3d *537,* 540 (9th Cir. 1998). An arbitration award will not be *set* aside unless it manifests a complete disregard for the law. Sheet Metal, *$4* F.3d at 1190. The grounds for overturning an arbitration award are narrow and the court finds that none arc present in this case. "If, on its face, the award represents a plausible interpretation of the contract, judicial inquiry ceases and the award must be enforced." Sheet Metal Workers 863 F.2d at 653.

Here, the first set of orders appears in the transcript of the April 1, 1999 hearing (Ex. A to Deroche Decl., various rulings by Judge Phillips during oral argument) *and* the May 10, 1999 written order. (See Deroche Decl., Ex. B (addressing the fraud and expense issue)). The second set of arbitration orders appears in the August 9, 1999 written *order* and the August 15, 1999 written order (Deroche Decl. Exs. H, I). These orders were all issued pursuant to the parties' agreement to arbitrate The court has reviewed each order and

finds them well-reasoned, properly founded on the facts of this case, and without manifest disregard for the law.[2]

IV. CONCLUSION AND ORDER

Judge Phillips stated ft best in his *May* 10, 1999 order when he wrote, "This litigation must END." EPI is entitled to the benefits of the settlement it bargained for over six months ago. For the reasons stated above, the court GRANTS EPI's motion to confirm the arbitration awards. The arbitration awards issued by Judge Phillips on (a) April 1, 1999, (b) May 10, 1999, (c) August 9, 1999 and (d) August 15, 1999 arc hereby CONFIRMED in their entirety, and incorporated by reference herein. The court hereby enters FINAL JUDGMENT in favor of EPI and against Gary Ravet and Promark Inc. EPI's motion for a temporary restraining order is DENIED as moot.[3] Finally, EPI's motion for sanctions is DENIED.[4] The Clerk of Court shall close the district court case file.

IT IS SO ORDERED.

DATE:October 26, 1999
Judge THOMAS J. WHELAN
United States District Court
Southern District of California

Footnotes

[1] The *ex* parte application and the court's order denying it are entered in the record of the Promark case.

[2] Promark and Ravet contend that Judge Phillips exceeded his authority and violated the constitution by

finding their conduct "vexatious" and by requiring approval from Judge Phillips before commencing litigation relating to the settlement agreement. Promark and Ravet have not, however, identified any legal ground that would justify invalidating this provision. The pre-filing requirement does not amount to a judicial declaration that Promark and Ravet are "vexatious litigants" within the meaning of the California Civil Code, and the provision has no affect outside the scope of this litigation. The court also finds the pre-filing requirement narrowly tailored to achieve the object of the settlement-the termination of this litigation.

[3] EPI's application for a temporary restraining order sought to secure interim relief pending this court's determination on EPI's motion to confirm Judge Phillips' arbitration awards. Because *the* motion has been granted, the court finds the restraining order application moot. To the extent the application is not moot, court denies it on its merits.

[4] The court finds sanctions inappropriate in *this* case for two reasons. First, Judge Phillips expressly declined to award sanctions or attorney's fees to EPI. Second, the court is confident that provisions in Judge Phillips' arbitration *awards,* including restrictions on filing subsequent actions relating to the February 1999 settlement agreement, completely address EPI's concerns of Ravet's alleged misconduct. The court is also confident that Raves, a licensed California: attorney, fully appreciates the risks and consequences associated with violating Judge Phillips' arbitration orders, which are now the order of this court by of their confirmation.